No. 10,990

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATHAN NEWMAN, W. O. FILES and BURT CAIN, *Appellants,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

APPELLEE'S REPLY BRIEF.

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STATEMENT OF CASE.

Appellants' statement of the case is correct.

STATEMENT OF FACTS.

Appellants' "statement of facts" is confined to a copy of the charging portion of the indictment; later (Br. 4-5-6) there is a short resume of evidence. The evidence for the purposes of this case is in the printed record, but for the convenience of the Court we shall summarize its (to our mind) salient features.

SUMMARY OF EVIDENCE.

Sometime early in January 1944 the defendants Charles Malaby and Nathan Newman while in Los Angeles discussed the matter of going into the whiskey business. Morris Newman (not a defendant in this case) said that he could go east and get some whiskey. After several discussions these three came to San Francisco to see if they could get a wholesaler to handle the whiskey they were going to bring in from the east.

On arrival in San Francisco, the defendant R. M. Schaffer (a former acquaintance of Malaby) was approached in this connection and was introduced to Nathan and Morris Newman by Charles Malaby. (P. R. 186-187.) Sometime later a sale of some 500 cases of whiskey was agreed upon by Charles Malaby, Morris and Nathan Newman to a Lester Williams. In connection with this transaction the matter of the deposit of the "overage"—(difference between the ceiling price and the agreed price) was discussed. Williams mentioned the necessity for an escrow holder and Malaby asked Schaffer to get someone to handle it. Schaffer mentioned the name of the defendant W. O. Files and said he would see if Files would handle it. Schaffer later reported that Files would handle it but that Files did not want to know about whiskey nor talk about it, and that those making deposits should not mention whiskey but should leave their money, get a receipt for it and walk out. (P. R. 188.)

The representation made to the depositors was that the money so deposited would be held for the period of escrow or until they had received their whiskey, or were satisfied that it would be delivered.

The agreement between the defendants was that the money so deposited (less Files' commission of 5%) would be immediately turned over to Nathan Newman to be used in financing their proposed operations. (P. R. 189.) Williams deposited $10,255 with Files on February 3, 1944. (P. R. 175-176-237.) Shortly thereafter one Gus Goldstein deposited $4,400.00 with Files in a similar transaction. (P. R. 168-170.) These sums less Files' commission of 5%) were immediately turned over by Files to Nathan Newman for the purpose of financing the proposed operation.

Up to this time the defendant Burt Cain was not yet in the picture, and Malaby was still trying to get a wholesaler and taking orders for whiskey. (P. R. 191.) Nathan Newman returned to Los Angeles and in a week or two told Malaby not to try longer to get a wholesaler—that they had one in Los Angeles. Malaby later went to Los Angeles and was introduced to Cain at the office of the International Import Co., the name under which Cain was licensed by the state and federal governments to do business as a wholesale liquor dealer. This federal license or basic permit was secured March 6, 1944. (P. R. 271.) He borrowed $5000.00 from Nathan and Morris Newman to assist in starting the business. (P. R. 284.) Before the federal license was issued he was not a wholesale

liquor dealer but was a commission liquor salesman. (P. R. 280.)

Nathan Newman was made sales manager, Morris Newman purchasing agent, and Malaby a salesman on commission.

Malaby, the Newmans and Cain discussed the fact that Morris Newman had contacted the Midvalley Distillery in the east and they agreed to buy for $2500.00 a franchise from the corporation to handle its liquor in California. (P. R. 193.)

Cain was familiar with the fact that "overage" had been collected from Williams and Goldstein. The matter of the general plan of operation and the collection of "overage" was discussed. It was agreed that Malaby should return to San Francisco and sell the Midvalley liquor or any liquor they could obtain and the overage collected was to be sent to Los Angeles and turned over to Cain. (P. R. 193.) Cain gave Malaby stationery and order blanks of the International Import Co., also credentials as a salesman. The price which he had been getting, $55.00 to $57.00 a case, was discussed with Cain by Malaby, also the possibility of getting $60.00. (P. R. 193-194.)

Malaby returned to San Francisco to continue the same activity. He enlisted the services of the defendants Oscar Lowenthal and Primo Rocco, and of several others not named as defendants.

Morris Newman and Cain made satisfactory arrangements with the Midvalley for a franchise al-

though the "franchise" price ($2500.00) was not accepted by that corporation but by a Mr. I. A. Needleman. (P. R. 285.) A car of McHenry blended whiskey was ordered and labels and samples furnished to the sales force. (P. R. 195.)

Malaby and his recruited sales force, with occasional help from Nathan Newman, managed to get additional orders for which over $60,000 in overage was collected; some $25,000 of this went through the Files "escrow" subject to his commission of 5%. The balance was collected for the most part by Malaby with Nathan Newman's occasional help. $5344.00 overage was collected by defendant Oscar Lowenthal. (P. R. 125.) This money was all except for the commissions, expenses and salaries, sent or taken to Los Angeles to be turned over to Cain. (P. R. 193, 200.)

The plan in all cases, as appears from the testimony of the purchasers in each transaction and from the exhibits introduced in practically every instance, was to have the customer execute a purchase order which recited the ceiling price or an approximation, with the notation "no cash down". The "overage" (the difference between the amount of the ceiling price and the agreed price) was usually collected in cash with a receipt given showing another transaction. Upon delivery of the whiskey or whenever the customer was satisfied it would be delivered these receipts were surrendered.

Before the car of whiskey arrived but apparently after they had satisfactory proof that it was on the

road Malaby and Nathan Newman collected the ceiling price, delivered invoices, and in many cases secured and destroyed the receipts for "overage". (P. R. 170, 195, 196, 197).

When the whiskey arrived in May and deliveries were made it was unfit for use and was condemned by the state authorities. The various customers then began to demand their money back. One of them, Williams, whose money was used in part to finance the first operations, had already gotten his deposit back. (P. R. 237.) Goldstein apparently was refunded his "escrow" deposit. (P. R. 170-171.) Money for repayment of all customers was apparently not available. The customers were stalled with promises of other whiskey, some refunds were made; Files and Schaffer signed two notes, $1000 was telegraphed to Rocco from Los Angeles; (P. R. 183) (Govt's Exh. No. 28); but the customers could not be kept quiet and the case broke. (P. R. 221.) What had happened to the money is not entirely clear; $2600.00 to one Hornstein, a connection man for Midvalley Distillery (P. R. 218); $14.00 a case "overage" to the distillery (P. R. 219), 5% "escrow" fees to Files; Malaby's and other salesmen's commissions, probably accounted for it.

While we cannot agree with appellants' statement (Br. 6) that "The complaints made by purchasers of liquor to governmental agencies was the single moving cause in bringing about the indictment," it is apparent that the conspiracy was brought into the open when the conspirators had no whiskey for their customers and no money to repay them.

The price at which the various transactions were arranged was from $55.00 to $60.00 per case. The ceiling ("maximum") price, on the whiskey the defendants were handling was then in this area $37.63 per case. (P. R. 80.) Gov't Exh. No. 1. (P. R. 245-246.) Gov't Exh. No. 2.

We shall answer the points raised by appellant in order as presented.

I.

ANSWERING POINT ONE. (Apps'. Br., pp. 7-31.)

THE INDICTMENT IS SUFFICIENT.

Before discussing the different questions presented, a brief analysis of the pertinent provisions of the Emergency Price Control Act may clarify the issues and simplify the points to be discussed.

The Act (The Emergency Price Control Act of 1942", 50 U. S. C. A. 901-946) so far as is here material provides in brief that the Price Administrator may by regulation or order establish maximum prices;[1] that it shall be unlawful to sell or deliver any commodity in violation of such regulation or order,[2] and that it is a

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[1]Sec. 902 (a). "Whenever in the judgment of the Price Administrator (provided for in Section 201) (section 921 of this Appendix) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act (sections 901-946 of this Appendix) he may by regulation or order establish such maximum price, or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (sections 901-946 of this Appendix)."

[2]904 (a). "It shall be unlawful * * * for any person to sell or deliver any commodity * * * in violation of any regulation or order under Section 2 (section 902 of this Appendix) * * * or to offer * * * or agree to do any of the foregoing."

criminal offense to do so wilfully.[3] Govt's Exh. No. 1 (P. R. 245-246), Govt's Exh. No. 2.

The indictment charges in plain language that the appellants were parties to a conspiracy which had for its object the commission of criminal offenses as defined by the Act.

ANSWERING 1. (Apps'. Br., pp. 11-14.)

As to 1, touching on alleged defects concerning the manner of alleging the regulations and orders of the Price Administrator.

The arguments advanced may be answered briefly as they are epitomized on page 14 of appellants' brief.

A. The indictment read in light of the whole statute shows that a charge of a conspiracy to violate Sec. 902 (a) alone, would not notify defendants of the criminal nature of the object of the conspiracy.

B. Again illustrates that the statute must be read as a whole. The object of the conspiracy is alleged to be "to commit offenses against the laws of the United States"; Sections 904 (a) and 925 (b) together define such criminal offenses.

C. Is in effect an argument that compliance with all administrative steps provided by statute for the issuance of administrative orders and regulations

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[3]Sec. 925 (b). "Any person who wilfully violates any provision of section 4 of this Act (section 904 of this Appendix) * * * shall upon conviction thereof be subject to a fine of not more than $5000 or to imprisonment * * * or not more than one year * * * or to both such fine and imprisonment."

must be specifically set out rather than as here generally. No authority is cited for this proposition; so far as we have been able to find there is none.

ANSWERING 2. (Apps'. Br., pp. 15-20.)

As to 2, "touching the failure to charge any conspiracy" we are unable to follow appellants' argument unless it is based on what we consider to be a strained construction of the language of the indictment. The statement is made (p. 18 Apps'. Br.) that they (defendants) are charged with a conspiracy by reason of the fact that "they did wilfully sell and deliver that commodity in violation of the regulation".[4]

The defendants are not charged with conspiring "by wilfully selling and delivering". In fact the manner and method of their conspiring whether by air, mail or rail is not set out. Nor do we know of any authority that requires where, as here, the purpose

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[4]Exactly how appellants' counsel arrive at the construction that the words of the indictment "defendants * * * did conspire * * * to commit offenses against the laws of the United States * * * by wilfully selling * * *" mean that "defendants, by wilfully selling * * *, did conspire" is not stated. We assume it is because of a predisposition in favor of infinitive rather than participial phrasing as a method of designating acts intended to be done to accomplish a stated object. Here the infinitive phrase "to commit offenses" is properly used as a noun; the participial phrase "by wilfully selling * * *" in its adjectival function modifies this infinitive phrase rather than the remote noun "defendants".

The *Birkind* case (p. 17, Apps'. Brief) approves the participial method here used, without comment. The participial method of designation was specifically approved in *"Pooler v. U. S.*, 127 Fed. 509-518; the Court stating: "* * * this form of allegation is clearly sufficient in Federal Courts in misdemeanors, and is also in harmony with the common practice in all courts."

of the conspiracy is the commission of a crime or crimes that the manner, method or means used to conspire be set out.

We disagree with the grammatical construction placed by appellant upon the wording of the indictment. We submit that the words of the indictment beginning "by wilfully selling * * * 'and ending,' Section 902 (a)" relate to the expression immediately preceding them, "to commit offences against the laws of the United States", and that they designate the acts constituting the offenses alleged to be the object of the conspiracy.

We respectfully urge that no strained construction should be permitted to obscure the plain language of the indictment which charges the defendants with intentional criminal agreement to commit the offenses of wilfully selling and offering to sell whiskey in violation of the Administrator's regulation.

The conspiracy here charged had for its object not the commission of one offense but of an unknown number. The cases cited at page 19 of Appellants' Brief are as a consequence not in point. The evidence (p. 6, supra) shows that this conspiracy endured until terminated by circumstances beyond defendants' control.

ANSWERING 3. (Apps'. Br., pp. 20-23.)

As to 3, with the point urged that this is an attempt to turn acts constituting a misdemeanor into a felony; we take no exception to the decisions cited nor to the opinions expressed in the quotations from various cases, articles and reports. We are willing that the Court here consider this case in light of the language of those cases and opinions.

Here we contend was "a serious and substantially continued scheme for cooperative lawbreaking" (Apps.' Brief, p. 23.) The scheme was both alleged and proven.

ANSWERING 4. (Apps'. Br., pp. 23-26.)

As to 4, concerning the point that there is a failure to charge conspiracy to violate any provisions of the Emergency Price Control Act we can find no basis for appellants' argument unless it depends upon the same construction of the language of the indictment as was urged pages 15-20 Appellants' Brief and has been answered. (pp. 9-10, supra.) The offenses, the commission of which are here alleged to be the object of the conspiracy, are created by statute.

We repeat that we do not allege the manner, method or means by which the defendants conspired. We do designate as the object of the conspiracy the acts which defendants contemplated doing, and, recognizing the fact that unless those acts were wilfully done they would not constitute offenses we alleged, in the

language of the statute, that the object of the conspiracy was to *wilfully* do them.

The plain meaning of the indictment is that the defendants conspired to wilfully sell and deliver whiskey at prices over those established by lawful regulation and order.[5]

The *Morris* case (Apps'. Brief, p. 25) does not go to the point of pleading raised. As to the burden of proof it is perfectly correct, and we respectfully urge that we have proven as alleged that the purpose or object of the conspiracy was to "wilfully" do acts constituting offenses against the laws of the United States.

ANSWERING 5. (Apps'. Br., pp. 26-31.)

As to 5, the alleged insufficiency of details in the indictment to meet the requirements of a criminal charge, we have read the argument and the authorities cited in its support, and cannot (unless appellants' counsel still contend that the indictment does not allege that the purpose of the conspiracy was to wilfully sell and offer to sell whiskey at prices in excess of those prescribed by law) understand either.

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[5]Technical accuracy must yield to the fair and obvious meaning of the language used when tested by the ordinary rules of construction.

Clement v. U. S., 149 F. 305, 313-315, 26 U. S. 562;
Nickell v. U. S., 161 F. 702-706;
Old Monastery Co. v. U. S., 147 F. (2d) 905-906.

Object of conspiracy need not be stated with the particularity required in indictment charging the substantive offenses.

Ford v. U. S., 10 F. (2d) 339, 343, 271 U. S. 652;
U. S. v. Walburg, 47 F. Supp. 352, 354;
Wong Tai v. U. S., 273 U. S. 77, 81.

If the contention here is that the description of the acts contemplated to be done is an allegation of means of conspiracy rather than a description of the offence contemplated, we have already answered it (pp. 9-10, supra); otherwise the authorities cited are not in point.

The charge here is one of conspiracy to commit offenses against the laws of the United States; those offenses are described in the terms of the statute which creates them. As we read the cases no further particularity is required.

We do not admit that the indictment is even technically defective. If it were considered to be so the case falls clearly within the provisions of 18 U. S. C. A. 556[6] and 28 U. S. C. A. 391.[7]

The language of the opinion in *U. S. v. Fawcett,* 115 F. (2d) 764 at 766 seems appropriate. The Court said referring to the above statutes:

> "These statutes, we think, evidence the intention of Congress to eliminate the effect of all

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[6] "Sec. 556. Defects of form. No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect, or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (R. S. Sec. 1025.)"

[7] "Sec. 391. (Judicial Code, section 269, amended.) New trial, harmless error. All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. Sec. 726; Mar. 3, 1911, c. 231, Sec. 269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181.)"

purely technical and formal defects which in no wise prejudice a defendant, or affect his substantial rights, on the theory that, in the progress of the law, narrow formalism should be eliminated and only the attainment of substantial justice sought."

ANSWERING POINT TWO. (Apps'. Br., pp. 32-54.)

ALLEGED IMPROPER ADMISSION OF EVIDENCE.

This portion of appellants' brief is devoted to the familiar problem involved in all extended cases (conspiracy or substantive) involving joint defendants. It is impossible to prove all of the case by any one witness.

The exceptions all relate to the admission in evidence of conversations and transactions had out of the presence of certain of the defendants which were admitted on the offer to the prosecution to connect, and subject to defendants' motion to strike.

We contend that all the evidence so received was properly connected with all the defendants before the close of the trial.

There was the same objection to correlated exhibits which were identified by the various witnesses as connected with these conversations and transactions. This documentary evidence had been marked for identification, and was offered and received in evidence at the close of the prosecution's case.[8]

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[8]These objections really go to the order of proof which is within the discretion of the trial Court.

Smith v. U. S., 267 F. 665, 668 (3);

U. S. v. Compagna, 146 F. (2d) 524, 530 (13-15).

As to whether such oral and documentary evidence was connected by proper evidence with all the defendants we submit the fair test is not to consider the evidence of each witness, and the face of each document alone, but in view of the entire evidence in the case.[9]

Counsel for appellants has selected (Apps'. Brief, p. 47) only seven assignments of error as basis for his argument in this connection.

We shall discuss in detail only the first of these assignments; that relative to the reception in evidence and the trial court's denial of the motion to strike the testimony of Steven Vincentini; Vincentini's testimony alone brings defendants Files and Schaffer into the picture; with the testimony of Vincenzo Gabrielli (P. R. 93 and 95) it also brings in the names of defendants Cain and Newman; with the exhibits, Govt. III, IIIa, IIIb, IIIc, it appears that the transaction fits the conspiracy pattern; a payment of "overage"; an order reciting the ceiling price with no mention of any prepayment; an "escrow" receipt which makes no mention of any liquor transaction, and finally the note executed by defendants Schaffer and Files, after the phone call to defendant Cain in Los Angeles; not merely for the amount Files had taken in "escrow", but for that amount plus what had been paid for whiskey delivered by the International Importing Co. (Cain) at the ceiling price.

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[9]Question is to be decided in light of evidence at conclusion of trial.

Marron v. U. S., 8 F. (2d) 251-257 (9).

It is also significant that in connection with the discussion as to whether the money would be repaid Files told Gabrielli that if he didn't believe it he could talk to Williams (P. R. 96). Williams was one of the first "escrow" depositors of "overage" ($10,255.00 on February 3, 1944) and had been fully repaid at the time referred to in Gabrielli's testimony. (P. R. 175-176-239.)

Further definite connection of Vincentini's testimony, if considered necessary, appears in the testimony of the witness Malaby generally in that he in effect testified that each of the appellants was a member of the conspiracy; specifically as to the transaction. (P. R. 197).

The testimony of William S. Johnson considered in connection with that of his partner Rudolph Lichtenburg (P. R. 99), Charles Ferretti (P. R. 199), Primo Rocco (P. R. 179-183), Ira Burnett (P. R. 164-167) and Charles Malaby (P. R. 198-199) shows the same clear connection of the challenged evidence to the appealing defendants. The testimony of Charles Ferretti and of Enrico Barotti relates to a transaction also handled by Rocco, Burnett and Malaby.

The testimony of Frank Spenger, with Govt's Exhibits 4, 4a and 4b; the testimony of W. H. Benson (P. R. 147-149, 242-245) Govt's Exhibit 31 and the testimony of Charles Malaby (P. R. 208-210) is not only sufficiently connected to have been properly received but might well be alone relied upon to sustain the conviction of each of the appealing defendants.

The testimony of Martin Fuchslin read in connection with that of John McKinnon (P. R. 149-152) with the whole testimony of Charles Malaby, particularly (P. R. 207) is certainly sufficiently tied into the general picture to be properly admissible.

Cuy Caputa's testimony alone with government's Exhibits 6 and 6a is admissible as to appellants Files and Newman; and with Malaby's general testimony particularly (P. R. 198) definitely fits the general picture so perfectly that its admission as to all defendants was clearly proper.

This brief discussion of the instances relied upon by appellants' counsel as error, we respectfully submit clearly shows that the evidence complained of was properly admitted as declarations and acts of conspirators, committed in furtherance of the conspiracy and during its existence.

ANSWERING POINT THREE. (Apps'. Brief, pp. 55-62.)
ALLEGED INSUFFICIENCY OF EVIDENCE.

The third point advanced is best disposed of by the language of appellants' brief at page 56:

> "We realize that if the indictment is good as a pleading and if there is any substantial evidence properly before the trial court, upon which the conviction of these defendants could be sustained, this court will not set aside their convictions."

No citation of authority is required to establish that this statement is made in realization of the law as to

the function of this court in reviewing the trial Court's finding of fact.

We do not consider it necessary to discuss the argument advanced by counsel in connection with the matter of the alleged insufficiency of the evidence. We have previously discussed in detail the evidence of certain witnesses in connection with alleged improper admission of evidence (pp. 14-17, supra), and have summarized the entire evidence (pp. 2-7, supra).

Appellants' comments on the testimony of Charles Malaby (Apps'. Brief, p. 61) is practically an admission that the point urged is of little merit. The language of the opinion in *U. S. v. Von Clemm,* 136 F. (2d) 968-970 seems appropriate. We quote:

> "In the light of the evidence above summarized it seems little short of effrontery for the appellants to argue that the jury's verdict is not supportable. Rarely have we seen a case where an illegal conspiracy was so clearly inferable from proven facts or where the accused were so completely enmeshed in a web of their own making."

CONCLUSION.

The indictment in the case is sufficient both in substance and form. It fully apprises the defendants of the charge against them and is sufficient to afford the basis of a plea of former jeopardy. It contains sufficient substance (factual allegations) to enable the trial court to state as it did that the facts alleged were sufficient to support a conviction on the charge made.

There was no improper admission of evidence which can be said to have resulted in appellants' conviction.

A conspiracy was charged and proved to exist. The evidence demonstrates beyond any doubt that there was here a concerted plan of criminal action having for its purpose the wilful sale of whiskey at prices in excess of those established by law.

It is respectfully submitted that these convictions should be affirmed.

Dated, San Francisco, California,
February 18, 1946.

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